No. 16036

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT N. CAMERON and JACK CRAWFORD,
Appellants,

v.

VANCOUVER PLYWOOD CORPORATION,
Appellee.

APPELLEE'S BRIEF

Appeal from a Judgment of the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, Judge.

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SUPPLEMENTAL STATEMENT OF THE FACTS

The appellants were plaintiffs in the action below. They sued to recover damages for the breach of an alleged oral contract to log timber. The timber concerned was government timber on revested Oregon and California Railroad lands and reconveyed Coos Bay Wagon Road Land Grants, commonly called "O. & C." timber. 43 C.F.R. § 115.37 (d), (e).

The basic O. & C. lands act of June 9, 1916 (39

Stat. 218) established a system of public competitive bidding for the sale of O. & C. lands, and this policy has continued under regulations prescribing the method of sale of lands managed by the Bureau of Land Management. 43 C.F.R. § 115.39 (a).

The sale involved here was advertised and competitive bids solicited, but no bids were received within the time specified in the notice (Tr. 19, 20). In a case such as this, where the original sale is "passed over" without anyone bidding, the regulations provide that the Bureau may extend the period for the receipt of bids for 90 days. 43 C.F.R. § 115.45. If, during this 90 day period, a written bid at not less than the appraised price is submitted, notice of the bid is posted in the office of the Bureau's district forester for a period of 5 working days, and if no other bid is made during the 5 day period, the sale is awarded to the sole bidder. 43 C.F.R. § 115.45 (1). However, if one or more other bids are submitted during the 5 day period, then *all* the bidders, high and low, are permitted to bid competitively at an oral auction of the timber. 43 C.F.R. § 115.45 (2).

On about July 1, 1957, during the 90 day extension for this "passed over" sale, the appellants, Crawford and Cameron, cruised the O. & C. timber here involved (Tr. 19, 20). A day or two later, Crawford contacted Bill Smith, an employee of the appellee Vancouver Plywood Co. Crawford called Smith's attention to the timber, and asked if Smith were interested in the timber (Tr. 21, 22). Smith said that he was and that he would take his cruiser and go down and look the

sale over, and that if he were interested, he would let Crawford know (Tr. 22).

The next contact between Crawford and Smith was a telephone call in which Crawford, in answer to Smith's request for a bid, stated that he could log the timber for $29.00 per thousand board feet (Tr. 22). Smith remarked that his cruise showed there was 18 per cent less timber in the area than indicated by the O. & C. appraisal (Tr. 23). Nothing further was said (Tr. 23).

A day or two later, Crawford contacted Smith again, and discussed the sale and the various requirements that Vancouver Plywood would make with regard to the logging of the timber if they could get the timber (Tr. 24).

A few days later, on the Sunday afternoon immediately prior to the sale date, Crawford visited Cameron at his home, and they talked about submitting a bid to purchase the timber (Tr. 27, 28). Having determined to enter a bid on the sale at this Sunday meeting (Tr. 27), Crawford went to the Vancouver Plywood plant to tell Smith of that decision (Tr. 26). Sometime prior to this meeting between Smith and Crawford, Smith had informed Crawford that Vancouver Plywood had submitted a bid and the appropriate deposit check to buy the timber involved (Tr. 31, 32, 33). Nevertheless, at this meeting, which was before the date of the oral auction—either the day before (Tr. 25-26, 34) or a day or two before (Tr. 38), Crawford told Smith that he and Cameron were going to enter a bid for the timber also (Tr. 26, 36). Crawford states that Smith told him to go ahead (Tr. 36).

The bid that Crawford and Cameron submitted was the appraised price, which was approximately $98,000.00 (Tr. 28, 38). Crawford assumed that Vancouver Plywood's bid was also the appraised price (Tr. 38). It is to be noted that bids on a "passed over" sale are almost invariably at the appraised price and no more, since if only one bid is received, the contract is awarded to the sole bidder (43 C.F.R. § 115.45 (1)), and if more than one bid is submitted within the 5 day period, all bidders, high and low, may bid again competitively at the oral auction. 43 C.F.R. § 115.45 (2).

The deposit required to insure that a bidder would make good his written bid was $5,600 (Tr. 29). Crawford and Cameron did not have sufficient money to purchase the $98,000.00 sale themselves, but they were to be financed by an "interested party" in the event they were the successful bidders (Tr. 29-30, 62). The interested party was either the U. S. Plywood Co. or the Mt. June Lumber Co. (There is a conflict in the testimony of Crawford and Cameron on this point, Tr. 30, 62.)

Crawford states that his next contact with Smith, after advising Smith that he and Cameron were going to submit a bid for the timber, was on the day the oral auction was to be held (Tr. 34, 35). Crawford states that he had arranged to meet Smith in front of the Coast Cable Company in Glenwood on the day of the oral auction, July 17, 1957, and that he and Smith went in Smith's car to Roseburg, where the oral auction was to be held (Tr. 35).

Since no other bids had been submitted, Vancouver Plywood on the one hand, and Crawford and Cameron on the other hand, were the only parties who could bid at the oral auction. 43 C.F.R. § 115.45. Sometime shortly before the day of the oral auction Crawford had agreed with Cameron that they would agree to withdraw their bid if they could secure Vancouver Plywood's contract to let them log the timber (Tr. 40). Therefore, on his way to the sale on July 17th, Crawford told Smith that if he and Cameron got the logging job, they would withdraw their bid (Tr. 37). Crawford states that Smith said that that was agreeable with him and that they could have the logging job (Tr. 37). Accordingly, Crawford states that he and Smith went directly to the sale, and after Smith made a bid of a nickel over the appraised price, Crawford withdrew his bid and the sale was awarded to Vancouver Plywood (Tr. 39).

Cameron was not present during the oral auction, but when Smith and Crawford left the Bureau of Land Management building, Cameron was outside (Tr. 39).

Crawford, Cameron and Smith then talked outside the BLM office, and Crawford and Cameron testified that during this conversation Smith stated that logging operations would begin in about 30 days (Tr. 40, 64). The contract price was confirmed and certain details of the logging operation were discussed (Tr. 64, 65). Crawford states that at this point Smith said, "Absolutely, you got the logging job when we get ready to log it." (Tr. 40).

About a week or ten days later, according to Craw-

ford (Tr. 43) and Cameron (Tr. 68), Cameron learned that another logger was logging the timber in question. After confirming the truth of this, and after complaining to a Mr. Plummer, who was in charge of log buying for Vancouver Plywood (Tr. 43, 44, 70), they learned that the logging contract had been given to a Mr. Nygaard (Tr. 45, 71). Thereafter, Cameron called Crawford to ask if he should go to a lawyer and Crawford consented (Tr. 45). This litigation resulted.

As the deposition of William Smith makes clear, the appellee denies the truth of most of appellants' testimony regarding any alleged agreement, but for purposes of the motion for summary judgment, appellee contends that if the material statements in appellants' depositions are accepted as true, the appellee is nevertheless entitled to judgment as a matter of law. Accordingly, the foregoing statement of "facts," is a statement of the "facts" as they appear from the sworn testimony of the appellants.

The depositions in this case show that all negotiations leading up to and including the alleged contract between Vancouver Plywood and the appellants, were between appellant Jack Crawford and William Smith, an employee of the appellee. Concerning these negotiations and the alleged agreement, it is apparent that appellant Cameron knew only what he was told by Crawford, and that in fact, Cameron did not meet Smith until after the alleged agreement had been made on the 17th of July (Tr. *passim*).

ARGUMENT

I

Appellants seek damages for breach of an alleged agreement wherein they agreed to refrain from bidding at an oral auction of government-owned timber in return for a promise by one of appellee's employees that they would be permitted to log the timber. The court below properly held that such an agreement tends to restrain or "chill" the bidding at an auction of public property, and is contrary to public policy and unenforceable.

A. It is the well-established law of Oregon that agreements which have a tendency to restrain competition in bidding at an auction of public property are unenforceable.

Appellants Crawford and Cameron, and appellee Vancouver Plywood Co. were the only parties qualified to bid at an oral auction of government-owned timber. Appellants seek damages for breach of an alleged agreement whereunder they would log this timber for Vancouver Plywood. The depositions on file in this case and abstracted in the Transcript of Record show that all negotiations between appellants and appellee up to and including the alleged oral agreement were conducted by appellant Jack Crawford and William Smith, an employee of Vancouver Plywood. Appellant Cameron had no contact with Smith until after the alleged agreement was made. Accordingly, it is the testimony of Jack Crawford which is the foundation of the motion for summary judgment. Mindful of the requirement that there be no issue of material fact, appellee has con-

ceded, for purposes of the motion, the truth of Crawford's testimony.

Crawford's own version of the alleged agreement is that he agreed to refrain from bidding at the oral auction in return for Smith's promise that he and Cameron would be permitted to log the timber at a specified price (Tr. 37). Since appellants and appellee were the only qualified bidders at the oral auction, the alleged agreement of appellants to refrain from bidding eliminated all competition at the sale, and permitted appellee to purchase the timber at the lowest price possible. A bargain which thus eliminates competition or "chills" the bidding at an auction of public property is almost universally held to be contrary to public policy and unenforceable as a matter of law. 5 *Williston on Contracts,* § 1663 (Rev. Ed.).

The applicability of the rule to the present facts is made clear by Williston's statement of the rule:

> ". . . Bargains directly tending to chill competition, such as one that the successful bidder shall pay a percentage to his competitors, or employ a possible competitor to perform the contract at a pre-agreed price, constitute illegal stifling of competition." 5 *Williston,* supra, § 1663, p. 4692.

The public policy of Oregon on this issue has been established by a series of decisions of the Supreme Court of Oregon beginning as early as 1895. *Kine v. Turner,* 27 Or. 356, 47 Pac. 664 (1895), established the Oregon rule that a party to an agreement not to bid at a public auction of government property cannot enforce rights acquired thereunder, even if the agreement was

made in the utmost good faith and for the mutual benefit of the parties.

In the *Kine* case, an act of Congress provided that certain surplus lands should be sold at public auction. The plaintiff agreed to refrain from bidding at the auction in return for defendant's promise to convey a portion of the land to plaintiff at the same price per acre as defendant might be required to pay for the whole tract. Plaintiff refrained from bidding at the sale and defendant purchased the lands at the appraised price, the lowest possible. The Supreme Court of Oregon affirmed the trial court's decision refusing to enforce defendant's promise to convey a portion of the land to plaintiff. The court held:

> ". . . The agreement between plaintiff and Switzler, whether it was for the conveyance of the land in dispute, as claimed by plaintiff, or for a twenty years' lease, as claimed by Switzler, was probably entered into at the time by both parties in good faith, for their supposed mutual benefit, and with no intention on the part of either to defraud the other. But this is not enough. The real question is whether the contract is not illegal because it contemplated a fraud upon the government of the United States, by stifling competition, thereby enabling Switzler to purchase at a price less than the land would otherwise have sold for. If so, it was void as against public policy, and plaintiff cannot recover in this suit, whatever may have been the motives of the parties, and however upright their intentions may have been, as between thmselves. . . ." 27 Or. 26 359.

The Court in *Kine v. Turner,* supra, went on to find, as an additional ground for refusing to enforce the illegal bargain, that the federal statute under which the

land was sold, " . . . provides that surplus reservation lands shall be sold at public auction, the evident policy of the government being to obtain the highest and best price therefor at an open public sale, fairly conducted, and any contract or agreement between intending purchasers tending to prevent competition at such sale is necessarily in violation of the spirit of the law under which it was made, and in fraud thereof." 27 Or. at 360.

The Court continued to state:

> ". . . It is important that sales at public auction should be conducted in good faith, without prejudice to the rights of any party, and for that purpose the law encourages bidding, and will not recognize as valid any contract or combination to prevent competition at such sales: [Citations]
>
> " 'A sale at auction is a sale to the best bidder,' says Henderson, C.J., 'Its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other, policy alone forbidding that the last mentioned should be enforced, but both policy and justice united to condemn the former. If this be the rule with regard to auctions instituted by private individuals, a *fortiori* should it be as to those public auctions instituted by law for great public purposes': *Smith v. Greenlee,* 2 Dev. 126 (18 Am. Dec. 564)." *Kine v. Turner,* supra, 27 Or. at 360, 361.

The agreement alleged by plaintiffs in the present case comes directly within the principles announced in

Kine v. Turner, supra. According to Crawford, he and Cameron got together before the sale and agreed that they would agree with Smith to refrain from bidding at the oral auction if Smith would agree to let them log the timber at a specified price (Tr. 40, 37). Crawford states that he then made just such an agreement with Smith while riding to the sale in Smith's car (Tr. 37). As a result, Smith purchased the timber without competition at the oral auction required by federal regulations, and necessarily obtained the timber for a lower price than if he had been forced to compete with another bidder. The purpose of the alleged agreement is clear: by eliminating competition, Vancouver Plywood is assured of obtaining the timber from the United States at the minimum price, and shares the spoils of this benefit with plaintiffs by letting them log the timber at a specified price.

The agreement alleged by plaintiffs in the case at bar would have as great a tendency to eliminate competition as the illegal bargain condemned by the court in *Rosenkrantz v. Barde,* 107 Or. 338, 214 Pac. 893 (1923). In the *Barde* case, the United States had seized and condemned a cargo of arms and ammunition carried by a vessel violating the neutrality laws, and had advertised the cargo for sale at public auction. Plaintiffs and defendant were members of a group formed for the purpose of bidding as a unit at the sale. In the course of the bidding, a third party named Kirk and defendant Barde had a whispered conversation, and when Kirk made the next bid, Barde stopped bidding. When plaintiffs consulted with Barde, he replied, "We are

protected." The property was "knocked-down" to Kirk. When Kirk and Barde later sold at a profit, plaintiffs instituted a suit against Barde to recover a share of the profits.

Although there were several other issues in the case, the court pointed out that:

> "The case is argued largely in the briefs for and against the theory advanced by the defendant that the testimony shows an unlawful combination of the parties for the purpose of chilling the bidding at the sale and preventing the property from bringing an adequate price. The trial judge adopted this theory and dismissed the suit." 107 Or. at 346.

The court conceded the proposition that it was possible for several parties to pool their resources and bid as a unit without preventing competition, if their purpose was to make a stronger bid, but held that the effect of the agreement under consideration was to stifle competition.

> "It is plain that in the instant case, the plaintiffs were not trying to encourage bidding or to increase competition so as to make the property bring a higher price. On the contrary, they were engaged in absorbing all opposition that appeared at all formidable. They drew the inference from the conduct of Barde and Kirk that the two of them had agreed to stifle bidding and allow the property to go to Kirk when Barde stopped bidding, as a result of the whispered conversation between them. Now, the plaintiffs seek the benefit of that unlawful compact when, in fact, they stood by, consenting to it." 107 Or at 347.

After rejecting various theories advanced by plaintiffs, the Court stated:

". . . The whispered transaction between Barde and Kirk, upon which the plaintiffs rely, plainly had the effect of stopping the bidding at a ridiculously low price for the property sold. As stated, we have here, only testimony on behalf of the plaintiffs. There was none offered for the defendant and it is said that he was not present at the trial. In *Jackson v. Baker,* 48 Or. 155 (85 Pac. 512), Mr. Chief Justice Bean, delivering the opinion wrote thus:

" 'If the illegality appear from the complaint or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, although such illegality is not pleaded as a defense, or insisted upon by the parties, and may have been expressly waived by them. It is an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties.'

"There are numerous authorities cited in support of this doctrine and it is the well settled rule in this state. . . ." *Rosenkrantz v. Barde,* supra, 107 Or. at 353.

The court concluded that the executory contract relied upon by plaintiffs was contrary to public policy and void, and accordingly the court affirmed the decree for the defendants.

The federal regulations (43 C.F.R. § 115.45) applicable to the sale of the timber involved in the present case, clearly contemplate open competition between the qualified bidders at the oral auction with an eye to obtaining the best possible price from a qualified bidder. The proposition that contracts are unenforceable which have the effect of "chilling" the competition contemplated by law was raised by the court on its own motion in the case of *Newport Construction Co. v. Porter,* 118 Or. 127, 246 Pac. 211 (1926). In the *Newport* case,

Newport agreed with Porter that Porter should bid on a road-surfacing contract and that Newport would surface the road for a price 10% less than the bid. When Porter refused to permit Newport to perform the road-surfacing, Newport sued Porter. The Supreme Court of Oregon reversed a decree for plaintiff and ordered the suit dismissed. The court stated, inter alia:

> "It is not a case where two or more persons openly combined as joint adventurers to bid for the performance of public work. On the contrary, it is an instance where two concerns agreed in effect that one shall bid and that the work shall be performed actually by the other at 10 per cent less than the contract price. The conduct of the parties, as described in the complaint, amounts to what is called 'chilling the bids.' That it is contrary to public policy and hence void thus to act is decided in *Rosenkrantz v. Barde,* 107 Or. 338 (214 Pac. 893), and that any scheme which has the effect of depriving the public of the protection embodied in a statute requiring contracts to be let to the lowest responsible bidder is void is taught in *Montague-O'Reilly v. Town of Milwaukie,* 101 Or. 478 (193 Pac. 824, 199 Pac. 605). . . ." 118 Or. at 134, 135.

The court then went on to state that although the issue of illegality had not been raised in the briefs, that where the illegality appears from the plaintiff's case, the court is constrained to raise the point itself. *Newport Construction Co. v. Porter,* supra, 118 Or. at 135.

See also: *Terwilliger Land Co. v. City of Portland,* 62 Or. 101 (1912) in which it is stated that, "It is a well-settled general rule that all contracts in which the public are interested, which tend to prevent the competition required by statute, are void. (Citations)." 62 Or.

at 106. Dictum in *Pyle v. Kernan,* 148 Or. 666, 36 P.(2d) 580 (1934) restates the principle that any contract having a natural tendency to stifle competition for public work is contrary to public policy, and that the test is the evil *tendency* of the contract and not its actual injury to the public in a particular instance. 148 Or. at 673, 674. Also see: *Reinstine v. Rosenfield,* 111 F.(2d) 892, 895 (7th Cir. 1940) (Where 7th Circuit specifically approved the reasoning of the court in *Kine v. Turner,* 27 Or. 356, supra, and the cases there cited.)

B. Because plaintiffs and defendant were the only qualified bidders at the oral auction, any bargain whereunder plaintiffs agree to withdraw from the bidding for a consideration, contravenes the established competitive bidding policy of the O. & C. statutes and regulations and is illegal and unenforceable.

(1) *The purpose of the policy of competitive bidding established in the O. & C. statutes and administrative rulings will be frustrated if agreements such as the agreement asserted by appellants are enforced.*

The alleged agreement in the present case is contrary to the provisions of the basic act of June 9, 1916 (39 Stat. 218) which provided that O. & C. timber lands "shall be sold for cash . . . at such times, in such quantities, and under such plan of competitive bidding as in the judgment of the Secretary of Interior may produce the best results, . . ." The regulations of the Commissioner of the General Land Office, and later of the Bureau of Land Management, have always followed the statuory directive for competitive bidding in public sales of O. & C. timber. The policy is continued under the present regulations. 43 C.F.R. § 115.36 *et seq.*

The purpose of the statutory and administrative policy is obvious. Only through fair and open competition may the government consistently obtain the actual market value of the timber it offers for sale. Figures released in the Report of Investigation of the Sale of Government-Owned Timber of the Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of Interior, which was submitted to the Comptroller General by the General Accounting Office on March 31, 1953, show that appraisal does not secure the actual market value. On page 51 of the above report, the following statistics are set forth respecting oral auctions of timber conducted by the Bureau of Land Management:

Year	Appraised Value	Bid Price	Percentage Over Appraised Value Obtained By Competitive Bidding
1948	$ 33,163	$ 73.333	121.1%
1949	312.219	587,583	88.2%
1950	1,752,730	2,973,951	69.7%
1951	3,293,023	4,737,156	43.9%
	$5,391,135	$8,372,023	55.3%

The above figures attest to the importance of competitive bidding to the government, and justify the reasoning underlying the established public policy. Absent competition, almost $3 million, more than 55% of the appraised value in the period covered, would have been lost.

Sanction of agreements such as the agreement Crawford swore that he made with Smith would open the door to similar agreements and the countless variations there-

of. The plain duty of this court is to uphold the established public policy that keeps this door shut.

(2) *Courts of other jurisdictions have been quick to refuse to enforce contracts such as the alleged agreement here where the elimination of one bidder eliminated all competition.*

The case of *Kuhn v. Buhl,* 251 Pa. 348, 96 A. 977 (1916), involves a factual situation which is analogous to the present situation in that the alleged bargain eliminated all competition. The *Kuhn* case involved the reclamation of desert lands in Idaho under a regulatory system established by act of Congress and complimentary Idaho statutes. The regulatory scheme provided the procedure by which individuals might obtain contracts from the land commissioners to construct reclamation projects. The individuals desiring a contract were to submit specific and detailed proposals to the land commissioners. Plaintiff and defendant each submitted proposals which were different in many respects, but involved the same area. The granting of one proposal would have necessarily required the refusal of the other, and accordingly the two proposals were competitive. While the proposals were pending, the plaintiff and defendant orally agreed that plaintiff would withdraw his bid and that defendant would purchase plaintiff's maps, plans, surveys and estimates for a specified sum.

When the plaintiff withdrew his bid according to the agreement, the defendant refused to purchase the surveys, maps, and estimates, plaintiff sued for damages.

The Supreme Court of Pennsylvania affirmed a judgment for the defendant on the ground that the contract was against public policy and unenforceable. The court stated:

> "The law is established that, where any public right, franchise, contract, or privilege is to be disposed of by government officials or agents, whether by a public letting or awarding upon bids, or by the exercise of official discretion without public bids [Citations], it is against public policy for one competing applicant, candidate, or bidder to contract for the extinguishment of another's competition [Citations]." *Kuhn v. Buhl,* supra, 96 Atl. at 983.

In the case of *Heid Bros. v. Riesto,* 281 S.W. 638 (Civ. App. Tex. 1926), the plaintiff and defendant were rival bidders for a government contract for wood. An agreement was reached whereunder plaintiff agreed not to bid on the contract, and defendant agreed to purchase 12,000 cords of wood from plaintiff at $6.00 per cord. Plaintiff did not bid, and the contract was awarded to defendant. However, defendant refused to purchase the 12,000 cords from plaintiff. When plaintiff sued for damages, the court reversed a judgment for the plaintiff and rendered judgment for the defendant.

The court found two grounds for its decision: That the contract was contrary to public policy, and that it was also violative of the anti-trust laws. The court stated that it was unable to find any other case that had held that such a contract violated the anti-trust laws, but it had no difficulty finding authority for the proposition that the contract was illegal on grounds of public policy. Among other authorities, the court quoted

with approval the following passage from 13 Corpus Juris p. 436:

> " 'Agreements not to compete with another in making bids, to withdraw a public or quasi public contract, to share in the result or profits, or other agreements having a direct tendency to prevent bidding or competition, are against public policy.' " 281 S.W. at 639.

See also: *Swan v. Chorpenning,* 20 Calif. 182 (1862) (Contract to withdraw bid for mail carriage contract and to assist defendant in getting a contract over a longer route including the original route bid, held void and illegal).

C. The alleged agreement that appellants would refrain from bidding at an oral auction of government owned timber if appellee would let them log the timber does not come within any of the recognized exceptions to the rules declaring such bargains to be illegal and void; especially where appellants and appellee were the only parties permitted to bid at the auction.

(1) *This is not a case where two parties pool their resources to bid where neither of them could bid alone; both appellants and appellee had submitted an independent bid, and both were interested in obtaining the entire property. Accordingly, the cases cited by appellant are not in point.*

The only Oregon decision cited by appellant is *Pyle v. Kernan,* 148 Or. 666, 36 P.(2d) 580. The agreement in the *Pyle* case in no way had the effect of stifling competition, and accordingly is not in point. In *Pyle v. Kernan,* supra, plaintiffs had submitted the low bid to the State Highway Commission for the resurfacing of twelve miles of highway. Defendant's bid was some

nine thousand dollars higher. After plaintiff had expended three thousand dollars on preliminary work, it was discovered that the type of rock specified in the contract could not be crushed except at excessive cost. The Commission conducted extensive negotiations with both the plaintiff and the defendant, and finally it was agreed that a different type of rock would be used, that plaintiff would assign the contract to the defendant, and that defendant would reimburse plaintiff for the expenditures to that point. Defendant finished the work and was paid, but refused to reimburse the plaintiffs. The Supreme Court affirmed a three thousand dollar judgment for the plaintiffs and rejected the contention that the assignment was illegal. The court pointed out that the state had received full benefit of competitive bidding, that the bidding was free and open, and that the contract had no effect on competition.

All of the other cases cited by appellant in which agreements to refrain from bidding at a public sale were not condemned as contrary to public policy were decided by state courts outside of Oregon. In each of these cases, the public policy reason for preserving competition was not present.

One recognized exception to the rule is where each of two or more parties are interested in a specific portion of the property and agree to pool their resources to make a single bid where none could bid alone. This is the principle involved in *Henderson v. Henrie,* 61 W. Va. 183, 56 S.E. 369, cited by appellants (Appellants' Brief p. 7). A similar principle is involved in the ALR

annotation cited on p. 8 of appellants' brief. 45 ALR 551. The proposition there contained is that two or more public contractors may legally combine to bid on a job which none had the resources to undertake alone. In both of the above cases, the reason for the exception is that such agreements cannot have the effect of eliminating a bidder or depressing the sale price, but on the contrary would secure a bidder who, without the agreement, would not bid.

The appellant does not demonstrate the applicability of the above exception to the present facts. The deposition of appellant Crawford demonstrates its inapplicability. Both appellee and appellants had sufficient resources to make the original bid, and to purchase the sale alone. Crawford and Cameron appear to be confused as to the identity of the "interested party" who was to provide the necessary financing to make the $98,000.00 purchase, but both are adamant in maintaining that they had the backing necessary (Tr. 29-31, 62-63). The appellee and appellant both entered their bids in good faith, and presumably both were able and intended to make a purchase independently of the other. If this is not true, the appellant's bid was a sham and entered solely for the purpose of discouraging other bidders, or of coercing appellee into letting appellants log the timber. Either purpose would be illegal.

(2) *The "exception," holding that persons having a common economic interest in the property may legally agree to refrain from bidding at a public sale of the property, is applicable only to public sales of private property where the group to which the "exception" applies are those intended to be benefited by the rule, and not to sales of government property where the government alone is intended to be protected.*

The other exception to the rule which is contained in cases cited by appellants on pages 7 and 8 of appellants' brief is also not applicable under the present facts. These are the cases holding that agreements between creditors, stockholders, bondholders, lienholders, etc., to refrain from bidding at a public sale are not illegal when made to protect a common economic interest in the property being sold. This is the situation in the cases *Lay v. Brown,* 106 Ark. 1, 151 S.W. 1001 (1912); *Powers v. Ullman, Stern & Krausse Inc.* (Tex. 1929), 16 S.W. (2d) 910; and *Sturgis v. Wylie* (Ark. 1938), 120 S.W. (2d) 571, cited by appellants on page 7 of their brief.

These cases all involved the public sale of private property, as distinguished from the public sale of public property. The contracting parties had an interest in the property being sold. The public policy in favor of free competitive bidding at sales of private property is designed to protect private persons who have an interest in seeing the property bring its highest price by compelling competition among the general public. The rule is relaxed, not in favor of all members of the general public, but in favor of some persons having an interest

in the property before the sale and who are members of the class which the rule was designed to protect. It is not merely the fact that one has some interest in the property to be sold which exempts him from the rule, but rather it is the fact that he is one of those whom the rule is intended to benefit. Therefore, in effect, he is permitted to waive the benefits of the rule if by doing so he can better protect his own interests.

However, a different purpose is embodied in the rule which prohibits stifling of competitive bidding at sales of government property. The policy here is not to protect the interests of private persons. The government alone is intended to be protected by the policy which demands competitive bidding, and declares illegal contracts which have the effect of stifling competition.

Appellants' brief suggests that they entered a bid to protect some economic interest in the timber here involved and that the public policy condemning agreements which have the effect of "chilling the bidding" on sales of government property should be relaxed in their favor. Appellant Crawford makes clear that he knew Vancouver Plywood had already submitted a bid with the appropriate deposit before he and Cameron submitted their bid (Tr. 26, 32, 34). The submission of a bid by Crawford and Cameron had the effect of avoiding the awarding of the sale to Vancouver Plywood at the appraised price, and threw the sale over to an oral auction at which only appellants and appellee could bid. 43 C.F.R. § 115.45. What economic interest Crawford thought he had in the timber prior to the auction is

not clear, but it is clear that appellants had no more legal interest in this O. & C. timber than did any other member of the public except that they were one of the only two qualified bidders. The public policy against agreements to refrain from bidding at public sales of government owned property, as opposed to privately owned property, was intended to protect the government *against* the interests of appellants, not to protect appellants' interests at the expense of the government.

II

The complaint and the deposition of appellant Crawford show clearly that the alleged agreement upon which appellants seek to recover is illegal and unenforceable; accordingly, there is no genuine issue of material fact, and the court below correctly decided that appellee was entitled to summary judgment as a matter of law.

A. When appellant Crawford's own deposition shows that the alleged agreement upon which the appellants rely is illegal, summary judgment is a proper remedy for appellee.

The depositions of Crawford, Cameron and Smith (Tr. 18-101) make it clear that all negotiations up to and including the alleged agreement were between Crawford and Smith. Cameron had no contract at all with Smith until after the sale and after the alleged agreement had been made. Accordingly, the deposition of Cameron is largely irrelevant surmise and hearsay, inadmissible in evidence, and it is the deposition of appellant Crawford which supplies the facts for purposes of the motion for summary judgment. Appellee

denies most of these "facts" in reality, but for purposes of the motion, and to demonstrate the absence of any genuine issue of fact, the appellee has conceded the facts as they appear from Crawford's own sworn testimony.

When the complainant's own showing in a contract action reveals that the action is illegal and unenforceable, summary judgment for the defendant should be granted. In the case of *Silverman v. Osborn Register Co.,* 155 F.(2d) 879 (U.S. App. D. C. 1946), the plaintiff sued for $280,000.00 damages for an alleged breach of contract. After taking the plaintiff's deposition, the defendant moved for summary judgment on the ground that the plaintiff's own testimony showed that the alleged agreement was illegal and unenforceable, and that accordingly, there was no issue of material fact which would justify a verdict for the plaintiff. The trial court granted defendant's motion for summary judgment and the Court of Appeals affirmed.

It appeared from plaintiff's deposition that plaintiff desired to obtain a certain contract from a federal agency. Plaintiff alleged that he entered into a contract with the defendant whereunder defendant was to raise, by 15%, a bid previously quoted to the plaintiff, and then submit that bid directly to the agency involved, with plaintiff's assistance. When defendant obtained the contract and refused to pay plaintiff 15%, plaintiff sued.

The Court of Appeals stated:

> "On these facts, all supplied by him, appellant asks us to hold that the trial court erred in finding, (a) that there was no real issue of fact, and that

therefore a Motion for Summary Judgment would lie; and (b) that the general principle laid down in Providence Tool Co. v. Norris, 2 Wall. 45, 54, 17 L.Ed. 868, is applicable. No real issue of fact appears, and we think the trial court correctly applied the underlying principle of the Tool Co. case, and quite rightly disposed of the litigation with a memorandum opinion pointing out:

> " 'The tendency of such an agreement as we have here, apart from other consideration, was to have the government pay fifteen percent more than it would presumably have paid under the circumstances. Such a contract is illegal and void on the ground of public policy and as a consequence the courts have no alternative in such a situation but to so declare it. True, the defendant reaps the benefit, but the courts cannot be concerned with that aspect of such matters, for reasons that are obvious and have been expressed judicially time and again. They, therefore, leave the parties where they find them.' " *Silverman v. Osborne Register Co.,* supra, 155 F.(2d) at 880.

Another case in which the defendant's motion for summary judgment was based entirely upon the deposition of the opposing party was *Jeffress v. Weitzman,* 221 F.(2d) 542 (U.S. App. D. C., 1955)(where the court stated:

> " . . . As permitted by Rule 56 (b), Federal Rules Civ. Proc., 28 U.S.C.A., the court before ruling considered a deposition in which plaintiff fully set forth the factual basis for his claim of a promise as alleged. No other facts being advanced summary judgment for defendant was proper, for the deposition shows no factual issue which would have justified the court in refusing to direct a verdict for defendant; that is, as the Rule states, defendant was entitled to judgment as a matter of law. Rule 56 (b), supra; *Dewey v. Clark,* 86 U.S. App. D. C.,

137, 143, 18 F.(2d) 766, 772." *Jeffress v. Weitzman,* supra, 221 F.(2d) at 543.

For other cases where the showing of one party provided the basis for a summary judgment for the other party see:

American Airlines v. Ulen, 186 F.(2d) 529 (U.S. App. D. C. 1949) (Summary judgment granted plaintiff where defendants answers to interrogatories showed negligence.); *Hoffman v. Lamb Knit Goods Co.,* 37 F. Supp. 188, 190 (D. C. Mich. 1940) (Summary judgment for defendant granted on the basis of plaintiff's deposition which failed to show necessary relationship of master and servant.)

B. The verified complaint alleges that on or about July 17, 1957, appellants and appellee entered into an oral contract. Appellant Crawford's own sworn testimony is that on the 17th of July he agreed with Smith that if appellee would let appellants log the timber, appellants would refrain from bidding at the oral auction. Taking these facts in the light most favorable to the appellants, the court below correctly granted appellee's motion for summary judgment on the ground that the alleged contract was an illegal bargain tending to stifle competition at an oral auction of government timber.

It is fundamental that the party moving for summary judgment must demonstrates that there is no issue of fact which would justify a verdict for the opposing party. In this case, appellee moved for summary judgment because it appeared from appellant Crawford's own sworn testimony that the agreement forming the basis for the action was illegal and unenforceable be-

cause it was an agreement which tended to "chill" the bidding at an oral auction of government-owned timber.

Judge Solomon, in his memorandum opinion pointed out that ". . . the testimony of Jack Crawford as to what transpired just prior to the auction, even when viewed and interpreted most favorably to the plaintiffs in the light of all of Crawford's other testimony, clearly shows that it was a contract to chill bidding, and therefore illegal. . . ." (Tr. 12).

Appellants were entitled to have every reasonable and legitimate inference in the testimony of Crawford resolved in their favor. However, the limit of the Court's indulgence for the appellants should be *legitimate* and *reasonable* inferences. The requirement of the motion for summary judgment is that there be no *"genuine* issue as to any material fact." Rule 56 (c) Fed. Rules Civ. Proc.

Somehow, counsel for appellants finds in the testimony of Crawford that there was an agreement prior to the agreement of July 17th. Just where any testimony of Jack Crawford indicates the making of a contract prior to July 17th has eluded counsel for appellee, and accordingly, it is submitted that Crawford's testimony permits no such inference. The testimony of Cameron is irrelevant on this issue because Cameron did not even meet Smith until after the sale. Cameron depended upon Crawford for all his information, and the testimony of Crawford makes it clear that the only contract made was the one he made with Smith on the way to the oral auction where he agreed to withdraw his bid if Smith would give them the logging job.

Counsel for appellants cannot defeat summary judgment by merely stating a fanciful conclusion unsupported by the evidence where every other indication is to the contrary. As stated in a well documented passage in *Moore's Federal Practice:*

> "And although the moving party may be unaided by any presumption, when he has clearly established certain facts the circumstances of the case may cast a duty to go forward with controverting facts upon the opposing party, so that his failure to discharge this duty will entitle the movant to summary judgment.
>
> "To defeat the movant who has otherwise sustained his burden within the principles above, the party opposing the motion must present facts in proper form—conclusions of law will not suffice; and the opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions." 6 Moore's Federal Practice, pp. 2130, 2131 (Para. 56.15 (3)).

The facts, according to plaintiff's sworn testimony, are that on the 17th day of July, 1957, appellants and appellee entered into an agreement whereby appellant agreed to refrain from bidding at an oral auction of government timber in return for appellee's promise that appellants would be allowed to log the timber.

If the evidence in Crawford's deposition were presented upon trial, the court would have no recourse but to direct a verdict in favor of the appellee. The purpose of the summary judgment rule is to avoid needless delay and expense where there are no *real* issues of fact which could be presented to a jury. This court in *Byrnes v. Mutual Life Ins. Company of New York,* 217 F.(2d) 497 (9th Cir. 1954) pointed out the readiness of this

and other courts of appeal to grant summary judgment where the pleadings and affidavits show that there is no real issue as to any fact material to the determination, and stated one of the tests to be as follows:

> "If the testimony presented by the affidavits is such that a directed verdict would have to be granted, the court is justified in granting summary judgment unless affirmative testimony is offered to discredit the testimony. The Court of Appeals for the Second Circuit has stated the principle in this manner:
>
> " 'When a party presents evidence on which, taken by itself, it would be entitled to a directed verdict if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result. In this case the defendant should have specified some instances that it had reason at least to suspect would contradict Markert; the record against it was too specific to be met by mere hypothesis. Had the case gone to trial, it could not have asked the judge to tell the jury that, though Markert had testified honestly, they must reduce the recovery because he might have been mistaken about some of the factors. We cannot therefore see how a trial would add any certainty to the conclusion which is inevitable upon this record.' Radio City Music Hall Corporation v. United States, 2 Cir., 1943, 135 F.2d 715, 718.
>
> "This test has been adopted and applied by this court in Gifford v. Travelers Protective Ass'n, 9 Cir., 1946, 153 F.2d 209, 211. And see, Hurd v. Sheffield Steel Corp., 8 Cir., 1950, 181 F.2d 269, 271. . . ." *Byrnes v. Mutual Life Ins. of New York,* 217 F.(2d) 497 at 501.

The appellants' brief states that appellee will place much emphasis on the fact that the complaint alleges

that the oral contract upon which appellants rely was entered into on or about the 17th day of July, 1957. Appellant assumes correctly. This was a sworn complaint alleging that an *oral* contract was made on July 17th. Appellant Crawford in his sworn testimony states that on July 17th, he met Smith, appellee's employee, and that they drove to the oral auction in Smith's car (Tr. 36, 37). At this point, appellants and appellee were the only parties qualified to bid at the oral auction and one of them would have to purchase the timber. Even if neither bid, the qualifying bid of one of them would be accepted. 43 C.F.R. § 115.36 *et seq.* Regarding this conversation, Crawford testified as follows:

"Q. Just tell me what that discussion consisted of.

A. Well, I agreed that if Bob and I got the job of logging it, we would withdraw our bid.

Q. Well, just tell me who said what and what was said, if you will.

A. Well, I can't remember of too much being said other than that.

Q. You say you agreed that if you and Mr. Cameron got the logging job, you would withdraw your bid on the timber, is that correct?

A. Yes.

Q. And what did Mr. Smith say to that?

A. He said that would be all right.

Q. Do you say that he agreed that you would get the job?

A. Yes. (42)

Q. Then what, if anything else, was said?

A. That is a hard thing to answer. We talked about several things but it was small talk.

Q. Well, did you say anything more about this timber or the bidding on it or anything in connection with it?

A. No.

Q. Just what you have told me here now?
A. Yes.
Q. And just to be sure that we have it correctly and have all of it, you told Mr. Smith that if you and Mr. Cameron got the logging job, that you would withdraw your bid, and you say that he said that was agreeable, that you could have the job, is that correct?
A. Yes. I think there is one thing there I ought to correct. I think I said I submitted that bid on the 17th. It was a day or two before the 17th when that bid was put in." (Tr. 37, 38).

It would be difficult to make it any clearer that Crawford, on July 17th, agreed to withdraw his bid if Smith would agree to give him the logging job. Crawford's testimony is that he and Cameron had agreed in advance that such an agreement should be made (Tr. 39, 40). The sworn complaint alleges that an oral contract was entered into on this day, July 17th. Nevertheless, counsel for appellants suggests that the reason the date July 17th was used was because that was the date the contingency of some earlier contract occurred "thus bringing the contract into *existence*." Appellants' brief p. 18 (emphasis added). Counsel for appellants makes it clear that he knows when a contract comes into "existence" when he hastens to assume "for purposes of argument" that they were in error in concluding that the contract was not in existence prior to the 17th, and suggests that an error in *dating* does not provide grounds for summary judgment. It is submitted that the complaint and Crawford's testimony make it obvious that no error in *dating* occurred, but that the contract relied upon was the illegal agreement of July 17th.

The distorted version of the clear words of plaintiff's testimony goes beyond the bounds of resolving ambiguities in favor of the plaintiff, and enters the realm of the fanciful and frivolous. The complaint and the testimony make it abundantly clear that it is Crawford's sworn position that on July 17, 1957, he agreed to refrain from bidding at the oral auction in return for Smith's promise that Crawford and Cameron would get the logging job.

Cameron and Crawford's agreement prior to July 17th that they would agree to withdraw their bid if Smith would agree to let them log the timber is inconsistent with the suggestion that appellants had a contract with appellee. If they had a contract, there would be no occasion for them to agree as to what they would do if they got the contract. Appellants and appellee were the only parties qualified to bid at the auction, and both had submitted a binding bid so that it was impossible for *both* to withdraw. It was assured that either Vancouver Plywood or appellants would get the timber. Even if neither bid at the oral auction, one would be required to make good on his qualifying bid.

In view of the fact that before he submitted his and Cameron's bid, Crawford knew that Vancouver Plywood had already submitted a bid (Tr. 32, 33, 34, 42), the very fact that the appellants submitted a bid at all is inconsistent with the suggestion that there was a contract between the parties prior to July 17th. On the contrary, it suggests that appellants intended to use their bid as a lever to coerce the appellee into giving them the logging contract. The latter is an inference

which may doubtless be resolved in favor of appellants; however, it requires no inference to understand the statement, "I agreed that if Bob and I got the job of logging it, we would withdraw our bid." (Tr. 37).

The summary judgment procedure prescribed in Rule 56 is designed to eliminate the time and expense, for parties and the courts, of an unnecessary and needless trial. The law does not permit enforcement of a contract such as the one the appellant swears he entered into with the appellee's employee. *Kine v. Turner,* 27 Or. 356, 359; *Newport Construction Co. v. Porter,* 118 Or. 127, 134 (1926). And where the evidence presented in support of a motion for summary judgment would entitle the defendant to a directed verdict, it rests upon the plaintiff to produce evidence which would change the result. *Gifford v. Travelers Protective Ass'n.,* 153 F.(2d) 209, 211 (9th Cir. 1946); *Byrnes v. Mutual Life Ins. Company of New York,* 217 F.(2d) 497 (9th Cir. 1954).

The appellants had more than ample time between the filing of the motion for summary judgment and the entry of the order granting that motion to submit affidavits regarding the existence of some other contract than the one of July 17th apparent in Crawford's testimony. The trial judge had indicated that the motion would be granted at an oral hearing long before the final briefs were submitted and judgment entered.

This court made clear that there is a difference between a "genuine" issue of fact and a mere pretended issue in *Suckow Borox Mines Consol. v. Borax Consol.,*

185 F.(2d) 196, 205 (9th Cir. 1950). There a defendant had disproved necessary allegations in the complaint, but the basic principle of the court's statement is applicable to the present situation in that: "The whole purpose of the summary judgment rule is to separate real and genuine issues from mere formal or pretended issues." *Suckow* case, supra, 185 F.(2d) at 205.

Appellants' brief concludes that "An effort to assure that there would be at least one bidder at the sale should not be twisted into an illegal scheme to 'chill the bidding.' " Appellants' brief p. 19. When it is remembered that Crawford knew Smith had submitted a bid with the appropriate deposit (Tr. 31, 32, 33, 42), and that the submission of a bid would result in a sale to the bidder unless another bid were made, and that the qualifying bids were binding (43 C.F.R. § 115.36 *et seq.*), the above suggestion is patently absurd. The appellants' position calls to mind Lord Kenyon's famous statement quoted in the leading case on illegality, *McMullen v. Hoffman,* 174 U.S. 639, 43 L.Ed. 1117 (1889), that the plaintiff will not be permitted to say:

> " ' . . . suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' " 174 U.S. at 656, 43 L. Ed. at 1124.

CONCLUSION

The appellants have filed a sworn complaint alleging that on or about the 17th day of July, 1957, appellants and appellee entered into an oral contract to log timber. Appellant Crawford has sworn that on the 17th day of July he agreed with appellee's employee Smith that if appellants got the logging job, they would withdraw their bid. Appellants and appellee were the only parties qualified to bid at the oral auction. The federal statutes and regulations, the decisions of the Oregon courts, and the decisions of the courts of other jurisdictions make it clear that contracts which tend to stifle competition in bidding for public property are illegal and void.

It is clear that the agreement testified to by Crawford was not an open and joint effort at combination by two parties who could not otherwise bid. Both had submitted a bid and both were prepared to bid at the oral auction until the illegal agreement eliminated appellee's only competitor.

Appellant Crawford's own clear testimony establishes that the contract referred to in the complaint was an illegal bargain to restrain or eliminate competition at an auction of government-owned timber.

In view of the clear state of the federal and state law condemning such contracts as unenforceable, no useful purpose would be served by committing the courts and the parties to an unnecessary trial.

Appellee respectfully prays that the judgment of the

District Court of Oregon granting appellee's motion for summary judgment be affirmed.

Respectfully submitted,

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